

TURNER BROTHERS, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT

IBLA 85-240

Decided April 28, 1987

Appeal from an order of Administrative Law Judge Frederick A. Miller dismissing application for review of notice of violation. TU 4-31-R (NOV 84-003-74-005).

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface mining Control and Reclamation Act of 1977: Appeals: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

The Board will reverse an order of an Administrative Law Judge dismissing an application for review of a notice of violation for failure to respond timely to a show cause order which concluded that the application had failed to allege facts entitling the applicant to administrative relief, in compliance with 43 CFR 4.1164, where the application was sufficient in that respect. The case will be remanded for further administrative proceedings.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for appellant; Richard E. Skawinski, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Turner Brothers, Inc., has appealed from an order of Administrative Law Judge Frederick A. Miller, dated November 28, 1984, dismissing its application for review of notice of violation (NOV) 84-003-74-005 issued by the Office of Surface Mining Reclamation and Enforcement (OSM), which application was filed pursuant to section 525(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(a) (1982).

In its NOV issued July 14, 1984, OSM cited appellant for the following six violations at its McIntosh No. 1 mine: (1) failure to establish permanent vegetation; (2) failure to pass all surface drainage from disturbed areas through a sedimentation pond; (3) failure to construct and/or maintain sedimentation ponds; (4) failure to return all disturbed areas to approximate original contour; (5) mining within 100 feet of a public road outside right-of-way; and (6) unauthorized disturbance off the permit area. OSM required certain corrective action by July 30 for violation 2 and by September 15, 1984, for violations 1, 3, 4, 5, and 6. On August 13, 1984, appellant filed an application for review of violations 1, 3, 4, 5, and 6, requesting that an Administrative Law Judge vacate the NOV in relevant part after an evidentiary hearing. Appellant contended that the NOV "should not have been written" because appellant had already been cited by the State for the same violations and had requested revisions of its permit which would render the violations moot. OSM filed an answer to appellant's application. By order dated November 5, 1984, Judge Miller set a December 4, 1984, hearing date for this and four other cases.

On November 15, 1984, OSM filed a motion to dismiss appellant's application for review, pursuant to 43 CFR 4.1169, for failure to allege facts, as required by 43 CFR 4.1164, which would entitle appellant to administrative relief. ^{1/} OSM argued that appellant's allegation that it had requested revisions of its permit was not a "defense" to an NOV issued with respect to violations under an outstanding approved permit and that appellant had not alleged any facts indicating "that there were no violations."

On November 16, 1984, finding OSM's motion to dismiss to be "well taken," Judge Miller issued a show cause order to appellant requiring it to submit a "proper pleading which meets the requirements of 43 CFR 4.1164" within 5 days of receipt of the order. Judge Miller stated that failure to respond timely would result "in the immediate dismissal of the application for review." Appellant received the November 16, 1984, show cause order on November 19, 1984.

On November 28, 1984, Judge Miller, noting that appellant had filed no response to the November 16, 1984, show cause order, issued an order dismissing appellant's application for review pursuant to 43 CFR 4.1169. Appellant has appealed from that order.

On November 29, 1984, the Administrative Law Judge received appellant's response to OSM's motion to dismiss and an amended application for review, along with a motion for leave to file an amended application pursuant to 43 CFR 4.1168(a). In its response, appellant contended that its original application for review was sufficient under 43 CFR 4.1164 in alleging facts which would entitle it to administrative relief. Appellant pointed to its original statement that it had already been issued an NOV by the State for

^{1/} In 43 CFR 4.1164, the Department provides that any person filing an application for review "shall incorporate * * * [a] statement of facts entitling that person to administrative relief."

the "same" violations, which it characterizes in its response as a statement that OSM lacked jurisdiction to issue an NOV, and that the NOV "should not have been issued" where the State had failed to act on appellant's requests to revise its permit within a reasonable time, as required by State law. Appellant concluded that administrative pleadings should be liberally construed, citing, inter alia, Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In its motion for leave to file an amended application for review, appellant specifically stated that the amended application was being filed in response to the November 16, 1984, show cause order.

On December 28, 1984, after appellant had filed its appeal with this Board, Judge Miller issued an order denying appellant's motion for leave to file an amended application for review because it was "not timely filed." Judge Miller also noted that he had dismissed appellant's original application for review in his November 28, 1984, order "for failure of the applicant to reply within the time provided in the order to show cause."

In its statement of reasons for appeal, appellant reiterates its contention that its original application for review was sufficient under 43 CFR 4.1164 in alleging facts which would entitle it to administrative relief. Appellant also argues that its response to OSM's motion to dismiss, amended application for review, and motion for leave to file an amended application were filed within the 5-day period set in the November 16, 1984, show cause order, i.e., on or before November 28, 1984. Appellant finally argues that Judge Miller failed to afford appellant 15 days to respond to OSM's motion to dismiss, as required by 43 CFR 4.1112(b). Appellant requests the Board to reverse the November 28, 1984, dismissal order.

OSM filed a response to appellant's statement of reasons, in which it contends that the "only" issue is whether appellant filed a timely response to the November 16, 1984, show cause order since that was the basis of the November 28, 1984, dismissal order. OSM states that the deadline for filing a response to the show cause order was November 27, not November 28, 1984, as appellant maintains. 2/ OSM concludes that appellant's filing on November 28, 1984, was untimely and, thus, Judge Miller properly dismissed appellant's application for review. OSM also argues that Judge Miller acted within his authority under 43 CFR 4.1169 in shortening the time for appellant to respond to OSM's motion to dismiss by requiring an earlier response to the November 16, 1984, show cause order.

In a reply brief, appellant contends that on appeal it should be permitted to litigate the question of the sufficiency of its original application for review raised by the November 16, 1984, show cause order and not just the timeliness of its response to that order.

[1] The first question for resolution is whether the original application for review was sufficient. An applicant for review of an NOV is

2/ As OSM points out, the discrepancy between appellant's and OSM's positions centers on whether Friday, Nov. 23, 1984, should be computed as a business day in determining the 5-day period set in the November 1984 show cause order.

required in part to state, with respect to each claim for relief, "facts entitling that person to administrative relief." ^{3/} 43 CFR 4.1164. 43 CFR 4.1169 further provides that, upon proper motion or after issuance of a show cause order, an Administrative Law Judge "may dismiss at any time an application for review which fails to state a claim upon which administrative relief may be granted." (Emphasis added.) A claim for relief must, of course, incorporate the "statement of facts" required by 43 CFR 4.1164. We believe the requirement to state a claim for relief should be liberally construed in the same manner that the courts have construed the comparable requirement in the Federal Rules of Civil Procedure. As the Supreme Court stated in Conley v. Gibson, supra at 47-48:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim [showing that the pleader is entitled to relief]" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. * * * Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. * * * The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. [Emphasis added; footnote omitted.]

The Departmental regulations with respect to administrative proceedings under SMCRA, likewise, provide a "liberal opportunity for discovery and * * * other pretrial procedures." See 43 CFR 4.1120 through 4.1141. Accordingly, an application for review will be given the same liberal construction in determining whether it contains an adequate claim for relief. The primary emphasis will be on whether the claim for relief, with supporting factual information, provides fair notice to OSM of the matter or matters at issue. See generally 2A Moore's Federal Practice § 8.13 (1985).

In Harry Smith Construction Co. v. OSM, 78 IBLA 27, 31 n.10 (1983), we concluded that the application for review involved therein had failed to allege "with sufficient specificity to put OSM on notice that applicant claims entitlement to an exemption [under 30 U.S.C. § 1278 (1982)]," which would have precluded OSM from asserting jurisdiction. ^{4/} In essence, we held that the

^{3/} In addition to a "statement of facts," an application for review of an NOV must contain, with respect to each claim for relief, a request for specific relief, a copy of the NOV, a request for or waiver of an evidentiary hearing and any other pertinent information. 43 CFR 4.1164.

^{4/} The pertinent portions of the application for review in Smith which we held did not adequately plead the lack of jurisdiction stated:

"(2) Applicant alleges that all violations hereinabove referenced fail to state a condition which constitutes a violation of the federal regulation pertaining thereto. * * *

applicant for review had failed to comply with 43 CFR 4.1164 in pleading the lack of jurisdiction. However, the application for review involved in Smith had raised the issue of the fact of the violations, which was properly considered by the Administrative Law Judge and the Board. In Titan Coal Corp. v. OSM, 78 IBLA 205, 212 (1984), citing Smith, we concluded that an allegation that an NOV was "improper" probably did not satisfy 43 CFR 4.1164, and, at the very least, did not put into issue the fact of the violations. However, the application for review involved in Titan Coal had raised the issue of jurisdiction, which was properly considered by the Administrative Law Judge and the Board.

In its original application for review, appellant contended that NOV 84-003-74-005 should not have been issued because appellant had already been issued an NOV by the State and had requested revisions of its permits which would effectively moot the violations. Appellant argues that its assertion that the State had already initiated an enforcement action raised the question of whether OSM had jurisdiction to issue the NOV. We note that, effective April 30, 1984, OSM assumed direct authority to a limited extent over enforcement of the approved State regulatory program in Oklahoma, with respect to surface coal mining operations. See 30 CFR 936.17 (49 FR 14688 (Apr. 12, 1984)). Under that assumption, the State was accorded authority to bring enforcement actions, already initiated, "to a final disposition." 30 CFR 936.17(a). Moreover, OSM was given authority to issue an NOV for any violation observed by an OSM inspector, "which has not been previously cited by the State." 30 CFR 936.17(a)(2) (1985). Regardless of whether appellant would ultimately prevail on this jurisdictional question, we must conclude that appellant's application for review stated sufficient "facts" to put OSM on notice that jurisdiction was at issue. This was adequate to satisfy 43 CFR 4.1164. 5/

fn. 4 (continued)

"(3) Applicant denies that the conditions present and in existence at the site constituted violations as set forth in the NOV and cessation order.

* * * * *

"* * * Applicant submits that the actions of the inspector in issuing the above described notice of violation and cessation order were arbitrary and capricious, without authority in fact or law, and exceeded his authority as an authorized representative of the secretary." Harry Smith Construction Co. v. OSM, supra at 28 n.5, 31 n.10.

5/ By itself, however, appellant's assertion that it had requested revisions of its permit, even if the State had unreasonably delayed action on the request and assuming that the revisions would effectively moot the violations, would not constitute assertion of a fact entitling appellant to administrative relief in compliance with 43 CFR 4.1164. It is well established that a mine operator "must obtain a variance before engaging in conduct that would otherwise violate surface mining regulations." B & J Excavating Co. v. OSM, 89 IBLA 129, 135 (1985), and cases cited therein. An operator cannot rely merely on the fact that it has requested a variance. Cf. Republic Steel Corp. v. OSM, 79 IBLA 315, 318 (1984).

Thus, we conclude that appellant's original application for review set forth "facts," i.e., OSM's lack of jurisdiction, which, if resolved in appellant's favor, would entitle appellant to administrative relief. Appellant was not required to set forth "facts" which would ultimately persuade the Department to afford administrative relief. At the time of filing an application for review, appellant was only required to allege facts. Appellant would then have the ultimate burden to prove these facts during the course of the administrative review proceedings. 43 CFR 4.1171(b); see Race Fork Coal Corp. v. OSM, 84 IBLA 383, 92 I.D. 68 (1985).

In view of the sufficiency of appellant's original application for review under 43 CFR 4.1164, we conclude that Judge Miller should have denied OSM's motion to dismiss and not issued the November 1984 show cause order. A more appropriate response would have been to issue an order requiring that appellant provide a more particular statement of facts to support its application.

Assuming the application for review was not minimally sufficient, and, thus, Judge Miller properly issued the show cause order, appellant's response thereto was not timely filed. In his November 1984 show cause order, Judge Miller required appellant to respond "within five (5) days of receipt of this order," by filing a proper pleading under 43 CFR 4.1164. 6/ Appellant received the show cause order on November 19, 1984. In accordance with 43 CFR 4.22(e), the deadline for filing was 5 days after November 19, excluding "intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days." Accordingly, the deadline for filing was November 27, 1984. 7/ Appellant's filing on November 28, 1984, the date the documents were mailed (43 CFR 4.1107(h)), was clearly untimely.

For the above stated reasons, we will reverse the November 1984 dismissal order and remand the case to Judge Miller to continue with the proceeding instituted by the filing of appellant's original application for review of NOV 84-003-74-005. 8/

6/ While ordinarily appellant would be entitled to 15 days from service of OSM's motion to dismiss to respond thereto, as provided by 43 CFR 4.1112(b), that provision permits and Administrative Law Judge to alter the 15-day period for filing a response.

7/ Friday, Nov. 23, 1984, is not excluded from the computation of the 5-day filing period as a "nonbusiness" day. A nonbusiness day necessarily refers to the local Federal office. Thus, only days, other than Federal legal holidays, on which the local Federal office which is to receive filings is not open to conduct business will be excluded. Such days would include instances where the office is closed due to weather, acts of God, etc. OSM states in its brief that the Federal Government was "open" on Nov. 23, 1984. Since appellant could have filed on that date, it is included in the 5-day filing period.

8/ We note that Judge Miller's Dec. 28, 1984, order denying appellant's motion for leave to file an amended application for review was issued at a time when the Board had jurisdiction of the case. Since he no longer had authority to act in this matter, his order was without effect. See Gateway Coal Co. v. OSM, 84 IBLA 371, 375 (1985). The amended application for review should be considered on remand.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is reversed and the case is remanded to Administrative Law Judge Miller for further action consistent herewith.

Gail M. Frazier
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge